No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extends to third-party counterclaim defendants.

2. Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, when the class action was originally asserted as a counterclaim against a co-defendant.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared before this and other federal courts to support defendants who assert their statutory rights to remove state-court actions to federal court. *See, e.g., Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005). In addition, WLF's Legal Studies Division regularly publishes on issues confronting defendants seeking to exercise those rights. *See, e.g.*, Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, WLF Legal Opinion Letter (Apr. 10, 2009).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Congress adopted the Class Action Fairness Act

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

of 2005 (CAFA), Pub. L. 109-2, to ensure that state-court class-action defendants could remove their case to federal court when the suit is substantial and raises issues of national importance. *Amici* are concerned that the decision below unduly restricts Congress's intended application of CAFA and invites plaintiffs' attorneys to "game" the system to prevent removal.

STATEMENT OF THE CASE

Congress's purpose in adopting CAFA is expressly stated in the statute. Congress sought to broaden federal diversity jurisdiction over class actions and "to restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). Congress found that class action lawsuits raising issues of "national importance" were being improperly "[kept] out of Federal court," and that state courts were "sometimes acting in ways that demonstrate bias against out-of-State defendants" and otherwise "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." *Id.*, § 2(a)(4).

CAFA states that a class action meeting all other statutory prerequisites may be removed to federal court by "any defendant." 28 U.S.C. § 1453(b). At issue here is whether Petitioner Home Depot U.S.A., Inc. qualifies as a defendant within the meaning of that provision.

This case arises out of a debt-collection action by Citibank, N.A. in North Carolina state court against Respondent George W. Jackson. Citibank alleged that

Jackson failed to pay for a water-treatment system he purchased using a Citibank-issued credit card. Pet. App. 2a.

Jackson's answer to the complaint denied liability. It also included a counterclaim against Citibank and third-party class-action claims (alleging unfair and deceptive trade practices regarding the sale of water treatment systems) against Home Depot and Carolina Water Systems, Inc. *Id.* at 3a. Citibank responded by voluntarily dismissing its claims against Jackson.

Home Depot filed a notice of removal in October 2016, citing federal jurisdiction under CAFA. A month later, Jackson amended his complaint to remove all mention of Citibank. In March 2017, the district court granted Jackson's motion to remand the case to state court. *Id.* at 16a-23a. Relying on Fourth Circuit precedent, the court held that only an "original defendant" qualifies as a "defendant" under the federal removal statutes and thus that Home Depot (which was not named by Citibank as an original defendant) was not entitled to remove the case to federal court. *Id.* at 19a-21a (citing *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008)).

The Fourth Circuit affirmed. Pet. App. 1a-15a. CAFA states that a class action meeting all other statutory prerequisites may be removed to federal court by "any defendant," 28 U.S.C. § 1453(b), but *Palisades* held that a third-party counterclaim defendant does not meet the statutory definition of "any defendant." Because Home Depot was a third-party counterclaim defendant in the action filed by

Citibank, the Fourth Circuit held that Home Depot was not entitled to remove under CAFA. *Id.* at 5a-7a.[2]

The appeals court rejected Home Depot's argument that this Court's 2014 *Dart Cherokee* decision—which declared that "no antiremoval presumption attends cases invoking CAFA," 135 S. Ct. at 554—casts doubt on the *Palisades* decision. *Id.* at 9a-11a. The court conceded that *Palisades* had interpreted CAFA "consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *Id.* at 10a (quoting *Palisades*, 552 F.3d at 336). But the court denied that applying its strict-construction canon to CAFA was tantamount to adopting the anti-removal presumption disclaimed by *Dart Cherokee*. *Id.* (stating that "it is possible to construe removal strictly without applying an anti-removal presumption.").

Home Depot sought review of the Fourth Circuit's determination that additional counter-defendants may not remove class actions to federal court under CAFA. In granting review, the Court directed the parties to address the following additional question: "Should this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?"

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[2] The Fourth Circuit described Home Depot as an "additional counter-defendant." In its order directing the parties to brief and argue an additional question, this Court referred to Home Depot and similarly situated parties as "third-party counterclaim defendants." *Amici* adopt the Court's terminology.

SUMMARY OF ARGUMENT

This is an easy case. CAFA authorizes removal by "any" class-action defendant. 28 U.S.C. § 1453(b). Home Depot, which was haled into court involuntarily by Jackson, meets any plausible definition of a "defendant." The Fourth Circuit's decision to the contrary does violence to the plain statutory language.

Permitting third-party counterclaim defendants such as Home Depot to remove cases to federal court under CAFA is fully consistent with Congress's expressly stated purposes in adopting CAFA. CAFA provides the federal district courts with original jurisdiction to hear larger class actions involving minimally diverse parties, and it allows both plaintiffs and defendants the option to choose a federal forum for such actions.

Congress found that before the adoption of CAFA, some plaintiffs and state courts had "game[d]" the system to prevent large lawsuits involving diverse parties from being heard in federal court, thereby "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." CAFA § 2(a)(4). Jackson's conduct in this case—filing his class claims as a counterclaim in the Citibank collection action rather than as a separate lawsuit against Home Depot, then almost immediately dismissing his claims against Citibank—is precisely the sort of manipulative pleading that Congress determined should not prevent class-action defendants from choosing a federal forum.

The Fourth Circuit concluded that this Court's *Shamrock Oil* decision held that the word "defendant,"

as used in federal removal statutes, applies only to "a defendant against whom the original plaintiff asserted a claim," not to defendant(s) added by a counterclaim filed by the original defendant. Pet. App. 6a. That conclusion misreads *Shamrock Oil*, which said nothing about third-party counterclaim defendants.

Shamrock Oil involved an effort by the plaintiff, following the defendant's filing of a counterclaim, to remove to federal court a lawsuit it initially filed in state court. The then-applicable general removal statute, the predecessor to 28 U.S.C. § 1441(a), provided for removal "by the defendant or defendants therein." The Court held that the statute did not authorize removal by a plaintiff who had voluntarily appeared in the state-court proceeding because "a right of removal [is] conferred only on a defendant who has not submitted himself to the jurisdiction [of the state court]." *Shamrock Oil*, 313 U.S. at 106. That holding says nothing about the removal rights of Home Depot and other third-party counterclaim defendants, none of whom have voluntarily submitted themselves to the jurisdiction of a state court. Indeed, the most natural reading of "the defendant or defendants" to whom removal rights are granted encompasses third-party counterclaim defendants. Moreover, *Shamrock Oil* based its holding on the history and purpose of removal legislation, not on a textualist interpretation of "defendant" or any other specific words in the general removal statute.

The Fourth Circuit noted in its 2008 *Palisades* decision that several federal courts, in the years preceding adoption of CAFA in 2005, held that § 1441(a) (which, like its predecessor, authorizes

removal "by the defendant or the defendants") does not authorize removal by third-party counterclaim defendants. *Palisades*, 552 F.3d at 332-33. Those courts concluded that *Shamrock Oil* had limited removal under § 1441(a) to "original" defendants. *Ibid.* *Palisades* reasoned that Congress, when it adopted § 1453(b) as part of CAFA in 2005, did not intend the "any defendant" provision to extend removal rights to third-party counterclaim defendants because: (1) by 2005, "'defendant' in the [general] removal context [was] understood to mean only the original defendant"; and (2) the word "defendant" in § 1453(b) should be given the same meaning as the word "defendant" in § 1441(a) because "we presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute." *Id.* at 334-35.

The Fourth Circuit's analysis is doubly flawed. First, as noted above, this Court has never suggested, either in *Shamrock Oil* or elsewhere, that third-party counterclaim defendants are not "defendants" permitted to remove lawsuits to federal court under § 1441(a). While a number of lower federal courts had so held prior to 2005, the decisions were not unanimous. Second, neither the text nor legislative history of CAFA suggests that Congress was aware of case law that addressed the removal rights of third-party counterclaim defendants, or intended that its grant of removal authority to "any defendant" should be interpreted narrowly. This Court has generally rejected claims that congressional acquiesce to decisions of the lower federal courts should be inferred simply because Congress amends a statute without addressing issues raised by those decisions.

The Fourth Circuit arrived at its erroneous interpretation of § 1453(b) based in part on its inappropriate bias against removal jurisdiction. The appeals court held that its narrow interpretation of "any defendant" was "consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." Pet. App. 7a (quoting *Palisades*, 552 F.3d at 336). That holding directly conflicts with *Dart Cherokee*'s admonition that "no antiremoval presumption attends cases invoking CAFA." 135 S. Ct. at 554. The Fourth Circuit's efforts to distinguish its decision to "strict[ly]" construe § 1453(b) from a forbidden "anti-removal presumption," Pet. App. 10a, are unpersuasive. In both instances, a court places its thumb on the anti-removal side of the scale; *Dart Cherokee* directed the lower courts to cease doing so in CAFA cases.

Because Home Depot is a "defendant" in this case under any plausible definition of that word, it qualifies as "the defendant or the defendants" entitled to remove the case to federal court under § 1441(a). But even if § 1441(a) were properly understood as barring removal by third-party counterclaim defendants, removal would still be authorized under § 1453(b). When it authorized removal under § 1453(b) by "any defendant" in a large class action, Congress signaled its intent that CAFA's removal "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart Cherokee*, 135 S. Ct. at 554 (quoting S.Rep. No. 109-14, at 43 (2005)).

ARGUMENT

I. CAFA AUTHORIZES REMOVAL BY "ANY DEFENDANT," A GROUP THAT INCLUDES THIRD-PARTY COUNTERCLAIM DEFENDANTS SUCH AS PETITIONER

A. Construing the Phrase "Any Defendant" in Accord with Its Most Natural Reading Furthers CAFA's Intent that Federal Court Jurisdiction Should Extend to Virtually All Class Actions

The Fourth Circuit held that a third-party counterclaim defendant is not a "defendant" within the meaning of 28 U.S.C. § 1453(b) and other removal statutes and thus is not permitted to remove cases to federal court under CAFA. Pet. App. 7a. That holding is irreconcilable with both the text and purposes of CAFA.

Home Depot is a "defendant" as that word is commonly understood. The "defendant" is "the person defending or denying; the party against whom relief or recovery is sought in an action or suit." *Black's Law Dictionary* (4th ed. 1968). "In common usage, this term is applied to the party put upon his defense, or summoned to answer a charge or complaint, in any species of action, civil or criminal, at law or in equity." *Ibid.* Home Depot is a party to these proceedings *solely* because it was "summoned to answer ... a complaint" filed by Jackson, and its sole role in these proceedings is to defend against Jackson's claims.

Jackson contends that CAFA adopted a definition of "defendant" that is much narrower than the commonly understood meaning of that term. Yet neither he nor the Fourth Circuit point to anything in the text or legislative history of CAFA to support that contention. This Court expressly rejected arguments that CAFA adopted a specialized definition of the word "plaintiff." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 170-71 (2014).[3] Nothing in CAFA suggests that Congress intended the word "defendant" to be treated any differently.

Indeed, CAFA erased any doubt on that score by including the word "any" (a word that does not appear in other removal statutes), thereby extending removal rights under CAFA to "any defendant." 28 U.S.C. § 1453(b). Congress would not have included the word "any" if it had really intended to adopt a specialized,

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[3] The Court explained:

> [R]espondents assert that "plaintiffs," like "persons," should be construed to "includ[e] both named and unnamed real parties in interest." ... But that stretches the meaning of "plaintiff" beyond recognition. The term "plaintiff" is among the most commonly understood of legal terms of art. It means a "party who brings a civil suit in a court of law." *Black's Law Dictionary* 1267 (9th ed. 2009). ... It certainly does not mean "anyone named or unnamed, whom a suit may benefit," as respondents suggest. ... Congress could of course require a real party in interest inquiry in a statute that uses the term "plaintiff" simply by saying so. *But it has not done that here.*

Id. at 170-71 & n.5 (emphasis added).

restricted definition of the word "defendant."

The Fourth Circuit sought to minimize the importance of the word "any" by asserting that § 1453(b)'s use of the phrase "any defendant" relates solely to the authority of a single defendant to remove a class action without the consent of other defendants and has nothing to say about which parties are granted removal authority. Pet. App. 7a. That assertion does not withstand analysis.

Section 1453(b) states, in relevant part, "**In general**—A class action may be removed to a district court of the United States in accordance with [28 U.S.C.] section 1446, ... except that such action may be removed by any defendant without the consent of all defendants." The Fourth Circuit is correct that § 1453(b)'s final prepositional phrase ("without the consent of all defendants") grants class-action defendants a removal right broader than they would otherwise possess under the general removal statute.[4] But focusing solely on that final prepositional phrase ignores the import of the words "any defendant," which appear immediately prior to that phrase. Congress would not have used the all-encompassing word "any" if it did not intend to convey that removal rights extend to any party that would be understood to be, in common parlance, a "defendant."

Congress would certainly have understood that, if it really intended to adopt a definition of "defendant"

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[4] Outside of the context of CAFA, a case may not be removed to federal court without the consent of all defendants. 28 U.S.C. § 1446(b)(2).

more restrictive than the commonly understood definition that word, its inclusion of the word "any" would be highly confusing because of its tendency to cause readers to conclude that "defendant" is broadly defined. If Congress had intended § 1453(b)'s final clause to be interpreted as understood by the Fourth Circuit (*i.e.*, as focusing *solely* on elimination of the unanimous consent requirement and saying nothing about which types of class-action defendants may exercise CAFA removal rights) it surely would not have used the word "any." For example, it could have written, "...except that removal is permissible without regard to whether other defendants consent." That Congress nonetheless chose to include the words "any defendant" is a strong indication that it intended the word "defendant" to be given its commonly understood definition. And as noted above, that commonly understood definition encompasses third-party counterclaim defendants, who are in court solely because they were summoned to answer a complaint.

Permitting third-party counterclaim defendants such as Home Depot to remove cases to federal court under CAFA is fully consistent with Congress's expressly stated purposes in adopting CAFA: "The purposes of this Act are to ... restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). Congress effectuated those purposes both by expanding the federal courts' diversity jurisdiction (thereby increasing the ability of plaintiffs to file their class actions in federal court) and by expanding defendants' rights to remove class actions from state court to federal court.

CAFA provides the federal district courts with original jurisdiction to hear a class action if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d). Subject to several narrow exceptions, defendants may remove to federal court any class action over which federal district courts have original jurisdiction. CAFA eliminates significant impediments to removal that exist with respect to non-class actions, including: (1) § 1446(c)(1)'s bar against removing diversity cases more than one year after a suit is commenced; (2) § 1441(b)(2)'s bar against removal by a defendant that is a citizen of the forum State; and (3) § 1446(b)(2)(A)'s bar against removal without the consent of all defendants who have been properly joined and served. 28 U.S.C. § 1253(b). CAFA also grants parties the right to seek review of orders granting or denying a motion to remand. 28 U.S.C. § 1253(c).

Congress adopted CAFA in significant part due to findings that "abuses of the class action device" throughout the prior decade had "undermined public respect for our judicial system" as well as "the concept of diversity jurisdiction as intended by the framers." CAFA §§ 2(a)(2) & 2(a)(4). Its list of "abuses" included findings that "State and local courts are ... keeping cases of national importance out of federal court" and are "sometimes acting in ways that demonstrate bias against out-of-state defendants." CAFA § 2(a)(4). As this Court has recognized, Congress's "primary objective" in adopting CAFA was "ensuring" a federal forum for interstate cases of national importance. *Knowles*, 568 U.S. at 595.

Preventing third-party counterclaim defendants from removing class actions to federal court would be wholly inconsistent with that statutory objective. An interstate class action is of no less "national importance" simply because it was initiated as a counterclaim by an original defendant and not as a claim by the original plaintiff. Nor is there any less danger that a state court hearing the case will "demonstrate bias against out-of-state defendants." It is undisputed that CAFA authorized Home Depot to remove Jackson's class claims to federal court had Jackson chosen to file them in a separate lawsuit rather than as part of a counterclaim to Citibank's debt-collection suit (subject only to any claim that one of CAFA's narrow exceptions to removal applies). There is no plausible reason why a Congress intent on affording a federal forum to significant class actions would have chosen to grant removal rights in the first instance and not the second.[5]

In sum, the text, purposes, and legislative

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[5] Moreover, Congress determined that pre-2005 removal statutes "enable[d] plaintiffs lawyers who prefer to litigate in state court to easily 'game the system' and avoid removal of large interstate class actions to federal court." S.Rep. No. 109-14 (2005) at 10. Congress adopted CAFA in part to "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." *Id.* 7. Jackson's conduct in this case suggests that he engaged in the very sort of gamesmanship that Congress sought to eliminate. Almost immediately after naming both Citibank and Home Depot in his counterclaim, Jackson dropped all claims against Citibank—thereby suggesting that his sole purpose in filing his counterclaim (rather than filing a separate lawsuit against Home Depot) was to prevent Home Depot from removing the class action to federal court.

history of CAFA all support Home Depot's contention that it is included within the category of defendants authorized by CAFA to remove class actions to federal court.

B. Authorizing Removal Under CAFA Is Fully Consistent with this Court's *Shamrock Oil* Decision

The Fourth Circuit was led astray by its misreading of this Court's *Shamrock Oil* decision. It interpreted *Shamrock Oil* as having held that the word "defendant," as used in federal removal statutes, refers only to "a defendant against whom the original plaintiff asserted a claim," not to defendants added to a lawsuit by virtue of a counterclaim filed by the original defendant. Pet. App. 6a. *Shamrock Oil* did not so hold, nor does the opinion say anything suggesting that third-party counterclaim defendants were not among the defendants authorized to remove cases to federal court.

The *Shamrock Oil* removal petition was filed by the original plaintiff in a state-court proceeding, not by a third-party counterclaim defendant. The plaintiff sought to remove the case to federal court after the defendant filed a counterclaim based on an unrelated breach of contract. The then-applicable removal statute (drafted in 1887) provided for removal of a cause of action only "by the defendant or defendants therein." 28 U.S.C. § 71 (1940). The court held that the statute did not authorize the original plaintiff to remove the lawsuit. *Shamrock Oil*, 313 U..S. at 107. It concluded that "a right of removal [is] conferred only on a defendant who has not submitted himself to the

jurisdiction [of the state court]," *id.* at 106, a category that did not include Shamrock Oil, the original plaintiff.

In arriving at its conclusion, the Court focused on a series of amendments to the general removal statutes in the late nineteenth century. The Court stated that Shamrock Oil's status as the original plaintiff would have precluded removal under the law as it existed before 1875. *Id.* at 105-106. It noted that it had ordered remand in a factually similar 1867 case. *Ibid.* In the earlier case, it held that under pre-1875 law, "[t]he right of removal is given only to a defendant who has not submitted himself to [the] jurisdiction [of the state court]; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action." *West v. Aurora City*, 73 U.S. 139, 141 (1867). In 1875, Congress "greatly liberalized" removal by among other things permitting any party (including the plaintiff) to remove lawsuits, regardless whether the defendant filed a counterclaim. *Shamrock Oil*, 313 U.S. at 106. But in 1887, Congress largely reinstated the removal provisions that had been in effect before 1875 and, in particular, eliminated the provision permitting removal by plaintiffs. *Id.* Under those circumstances, the Court concluded that Congress in 1887 intended to reinstate pre-1875 removal law (as articulated in *West*) with respect to original plaintiffs against whom a counterclaim had been filed, and to eliminate the plaintiff-removal rights that existed from 1875 to 1887. *Id.* at 108 (stating that "we find no material difference upon the present issue between the two statutes, and the reasoning of the Court in support of its decision [in *West*] is as applicable to one as to the other").

The Court also relied on the legislative history of the 1887 legislation. The Court noted that a House committee proposed eliminating an *original* plaintiff's removal right because:

> [I]t is believed to be *just and proper to require the plaintiff to abide his selection of a forum*. If he elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause.

Id. at 106 n.2 (quoting H. Rep. No. 1078, 49th Cong., 1st Sess., at 1 (1887)) (emphasis added).

In sum, *Shamrock Oil* held no more than that an *original* plaintiff may not remove a case to federal court after the defendant files a counterclaim. It reasoned that the predecessor to § 1441(a) conferred a right of removal only a party "who has not submitted himself to the jurisdiction" of the state court. *Shamrock Oil*, 313 U.S. at 106. As Judge Bybee has observed, *Shamrock Oil* lacks any direct application to a third-party counterclaim defendant, who "has no say in the chosen forum," is "dragged into state court by service of process the same way that any other 'defendant' is brought into court," and "is as much a defendant as if the case had been originally brought against [him]." *Westwood Apex v. Contreras*, 644 F.3d 799, 808 (9th Cir. 2011) (Bybee, J., concurring) (quoting *Ford Motor Credit Co. v. Aaron Lincoln-Mercury*, 563 F. Supp. 1108, 1113 (N.D. Ill. 1983)). Nothing in *Shamrock Oil* supports the Fourth Circuit's holding that Congress intended to ascribe to the word

"defendant" a specialized meaning far more circumscribed than the commonly understood meaning of that term.

C. In Adopting CAFA, Congress Did Not Ratify Lower Courts' Erroneous Interpretation of *Shamrock Oil*

Several federal courts, in the years preceding CAFA's adoption in 2005, held that the general removal statute, 28 U.S.C. § 1441(a),[6] does not authorize removal by third-party counterclaim defendants. Section 1441(a) authorizes removal by "the defendant or the defendants"; those courts held that third-party counterclaim defendants were not encompassed by that phrase. The Fourth Circuit relied heavily on those decisions in concluding that Congress did not authorize removal by third-party counterclaim defendants under CAFA. The Fourth Circuit's reliance on lower-court case law interpreting a separate statute was misplaced.

The Fourth Circuit explained its rationale in its 2008 *Palisades* decision. *Palisades* reasoned that Congress, when it adopted § 1453(b) as part of CAFA in

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[6] 28 U.S.C. § 1441(a) states:

> GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

2005, did not intend the "any defendant" provision to extend removal rights to third-party counterclaim defendants because: (1) by 2005, "'defendant' in the [general] removal context [was] understood to mean only the original defendant"; and (2) the word "defendant" in § 1453(b) should be given the same meaning as the word "defendant" in § 1441(a) because "we presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute." *Id.* at 334-35.

The premise underlying the Fourth Circuit's logic is flawed: there was no widespread judicial consensus in 2005 that "the defendant or the defendants" entitled to remove a case under § 1441(a) was limited to "original" defendants and did not include third-party counterclaim defendants. As explained in detail in the prior section, nothing in *Shamrock Oil* or any other decision of this Court lends support to that viewpoint; *Shamrock Oil* focused solely on the removal rights of original plaintiffs. While the no-removal-by-third-party-counterclaim-defendants position can be fairly labeled the majority position among the limited number of cases in which the issue was raised, it was not unanimous. For example, *Ford Motor Credit* provided a well-reasoned analysis of § 1441(a) and concluded that removal by third-party counterclaim defendants was authorized by the statute:

> Congress, as well as the Framers of the Constitution, created diversity jurisdiction to protect litigants from the prejudices they might encounter in state

> courts against citizens of foreign states. If removal is not permitted here, Ford, a foreign citizen, must defend an action brought by citizens of Illinois in their own state courts. That is exactly the situation where Congress and the Framers intended a litigant to have access to a federal forum.

563 F. Supp. at 1114.

There is a good explanation of why this removal issue was litigated only infrequently before 2005. Plaintiffs' lawyers had at their disposal a ready means of preventing removal of state-law class actions filed in state court. They added extraneous parties to ensure that complete diversity of citizenship did not exist (*e.g.*, including the local retailer in a product-liability claim against an out-of-state manufacturer). *See* 28 U.S.C. § 1332(a) (2004) (no diversity jurisdiction exists over cases in which any plaintiff is a citizen of the same state as any defendant). Even if counsel never intended to pursue the claims against the extraneous, non-diverse defendant, counsel could prevent removal by keeping the extraneous defendant in the case until expiration of the one-year removal deadline. 28 U.S.C. § 1446(c)(1). So plaintiffs rarely had occasion to seek remand on the ground that § 1441(a) did not permit removal by third-party counterclaim defendants. Only after the adoption of CAFA—which eliminated the complete-diversity requirement for class actions—did the issue become a frequent subject of litigation.

Nor does the Fourth Circuit's desire to avoid inconsistent interpretations of §§ 1441(a) and 1453(b)

justify its decision. The two statutes do not contain identical language. Section 1441(a) permits removal "by the defendant or the defendants." Section 1453(c) permits removal by "any defendant." No canon of statutory construction presumes that Congress intended that § 1453(b) be construed in accord with the construction given by some lower federal courts to a different statute that it phrased differently.

Most importantly, there is no evidence that Congress, when it adopted CAFA in 2005, was aware of lower federal-court decisions that had addressed the application of § 1441(a) to third-party counterclaim defendants. The legislative history includes no discussion of the issue—presumably because the gamesmanship undertaken in this case (tacking a class-action counterclaim onto a state-court lawsuit filed against a consumer) was so infrequently employed pre-CAFA.

This Court has generally rejected claims that congressional acquiesce to decisions of the lower federal courts should be inferred simply because Congress amends a statute without addressing issues raised by those decisions. *See, e.g. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("As a general matter, ... we have held that these arguments deserve little weight in the interpretive process."); *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). Moreover, CAFA never focused on the

statute addressed by the lower-court decisions (§ 1441(a), the general removal statute) but instead created an entirely new statute that focused solely on removal of class actions. Given the absence of evidence that Congress was even aware of those court decisions, there is no reason to assume that Congress borrowed the non-unanimous judicial interpretation of the phrase "the defendant or the defendants" when employing a different phrase ("any defendant") in a different removal statute.

D. The Decision Below Was Based in Part on an Inappropriate Bias Against Removal Jurisdiction

Underlying the Fourth Circuit's decision to affirm the remand order was its understanding that removal statutes should be construed "strictly" and that all doubts about such issues should be resolved "in favor of remand." Pet. App 10a (quoting *Palisades*, 552 F.3d at 336). That holding directly conflicts with *Dart Cherokee*'s admonition that "no antiremoval presumption attends cases invoking CAFA." 135 S. Ct. at 554. *Amici* urge the Court to reaffirm *Dart Cherokee*'s admonition and to declare further that removal jurisdiction is *never* subject to a strict-construction mandate.

The Fourth Circuit has long held removal jurisdiction in disfavor. *See, e.g., Dixon v. Coburg Dairy*, 369 F.3d 811, 816 (4th Cir. 2004) (*en banc*) ("We are obliged to construe removal jurisdiction strictly because of the significant federal concerns implicated. Therefore, if federal jurisdiction is doubtful, a remand to state court is necessary.") (citations omitted); *Roche*

v. Lincoln Property Co., 373 F.3d 610, 615 (4th Cir. 2004), *rev'd*, 546 U.S. 81 (2005). The Fourth Circuit has carried over that disfavor to CAFA removal cases, *Palisades*, 552 F.3d at 336 & n.5, and to removal cases decided after *Dart Cherokee*. *See, e.g.*, Pet. App. 10a; *Jones v. Wells Fargo Co.*, 671 Fed. Appx. 153, 154 (4th Cir. 2016); *Hurley v. CBS Corp.*, 648 Fed. App. 299, 303 (4th Cir. 2016).[7] Yet its rule of statutory construction derives no support from the historical understanding of removal rights. To the contrary, the Framers contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 486 (2d ed. 1836). Similarly, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the

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[7] The Fourth Circuit is not alone among the federal appeals courts in its disfavor of removal jurisdiction. Indeed, prior to this Court's 2014 *Dart Cherokee* decision, *every* appeals court other than the Seventh Circuit had adopted a presumption against removal of CAFA cases.

Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included cases "between Citizens of different States" within the "judicial Power." U.S. Const., art. III, § 2, cl. 1.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection

> of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816).

In sum, granting out-of-state defendants broad rights to remove cases to federal court is fully consistent with the federal system of government established by the Framers. It is no more an affront to state courts to permit out-of-state defendants to remove cases to federal court than it is to permit out-of-state plaintiffs to invoke diversity jurisdiction in order to file federal court lawsuits that raise state-law claims.

Indeed, there is little reason to suppose that state court judges are offended when newly filed lawsuits are removed from their courtrooms and transferred to federal court. As one scholar has observed:

> [T]he comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far greater concern of state courts may well be that the federal courts will relieve the congestion on their own dockets at the expense of state courts.

Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 660 (2004).

Those who support the notion that removal statutes ought to be strictly construed often point to *Shamrock Oil*, which (as noted above) held that an 1887 amendment to the general removal statute eliminated the removal authority of the original plaintiff in a state-court proceeding. *Dicta* appearing in the final paragraph of *Shamrock Oil* added, "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for strict construction of such legislation." 313 U.S. at 108. But as the quoted language expressly states, the Court's call for "strict construction" was based on its interpretation of "successive acts of Congress," not on constitutional considerations.[8] Moreover, by stating that federal courts should "scrupulously confine their own jurisdiction to the precise limits which the statute has

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[8] The final paragraph in *Shamrock Oil* was borrowed almost verbatim from the Court's earlier decision in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), which addressed whether the plaintiff in a diversity action had adequately alleged that his claim satisfied the $3,000 amount-in-controversy requirement. That decision makes clear that when *Healy* (and later *Shamrock Oil*) referred to "successive acts of Congress regulating the jurisdiction of federal courts," they were referring to legislation increasing the jurisdictional amount in diversity cases (which was established at $500 in 1789 and gradually increased to $3,000 by 1911). In light of inflation throughout that same period, it may not be entirely accurate to assert (as did *Healy*) that Congress had "narrowed" diversity jurisdiction by increasing the jurisdictional amount. *Id.*

defined," the Court was simply warning against overly expansive interpretations of diversity and removal jurisdiction, not (as does the Fourth Circuit) decreeing that whenever jurisdiction is in doubt, the doubt should be resolved by a remand to state court.

Any congressional policy of strictly limiting removal jurisdiction has long since been abandoned. In the 77 years since *Shamrock Oil* was decided, Congress has repeatedly expanded removal rights, with CAFA being the most obvious example.[9] Recent Supreme Court decisions have decided removability questions solely by reference to the relevant statutory language, without applying any presumptions. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). *Breuer* turned on the meaning of a potentially ambiguous clause in 28 U.S.C. § 1441(a), the general removal statute. The Court explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret the ambiguous clause as precluding removal. After noting *Shamrock Oil*'s "strict construction" language, the Court said, "But whatever apparent force this argument might have claimed when

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[9] Other examples of legislation expanding removal rights include Congress's 1965 decision to increase the time period for filing a removal petition from 20 to 30 days following receipt of the complaint. *See* Act of September 29, 1965, 79 Stat. 887; *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 352 n.3 (1999). Congress amended 28 U.S.C. § 1446 in 1988 to simplify the removal process considerably, eliminating the requirement that a "verified petition" be included in the removal papers. Instead, defendants need now only include "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642.

Shamrock was handed down has been qualified by later statutory development." *Id.* at 697.

Dart Cherokee held that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. at 554. *Dart Cherokee* focused solely on CAFA issues and thus had no occasion to address whether an "antiremoval presumption" should apply in other contexts. *Id.* (stating that "[w]e need not here decide whether such a presumption is proper in mine-run diversity cases"). Because the two questions presented in this case are more wide-ranging, *amici* urge the Court to reach the issue not addressed in *Dart Cherokee* and declare that an antiremoval presumption is *never* appropriate. Any rule stating that close jurisdictional issues should always be resolved in favor of remand is inconsistent with the Court's frequent admonition that "[j]urisdiction existing, ... a federal court's obligation to hear and decide a case is virtually unflagging." *Sprint Telecommunications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

At the very least, the Court should admonish the Fourth Circuit to heed *Dart Cherokee*. The Fourth Circuit's contention that its decision complies with *Dart Cherokee* is incorrect. It declared that it has a "duty" to "construe removal jurisdiction strictly and resolve doubts in favor of remand." Pet. App. 7a (quoting *Palisades*, 552 F.3d at 336). The court's efforts to distinguish that standard from an anti-removal presumption are unavailing. When a court resolves all doubts regarding the meaning of a statute (*e.g.*, does "any defendant" really mean *any* defendant,

including a third-party counterclaim defendant?) in favor of removal, its actions are indistinguishable from an anti-removal presumption. In both instances, a court places its thumb on the anti-removal side of the scale; *Dart Cherokee* directed the lower courts to cease doing so.

II. CAFA AUTHORIZED PETITIONER'S REMOVAL WITHOUT REGARD TO WHETHER *SHAMROCK OIL* BARRED REMOVAL UNDER SECTION 1441(a)

Amici urge the Court to resolve the first Question Presented by ruling that the holding in *Shamrock Oil*—that an original plaintiff may not remove a counterclaim against it—does *not* extend to third-party counterclaim defendants. The policies that have led successive Congresses to maintain the removal jurisdiction of the federal courts—including the perceived need to protect out-of-state defendants from bias in favor of in-state plaintiffs—apply just as strongly to third-party counterclaim defendants as they do to any other defendants. Nothing in the Court's case law or the legislative history of § 1441(a) suggests that third-party counterclaim defendants are not among "the defendant or the defendants" authorized to remove cases to federal court.

But regardless how the Court resolves that question, Home Depot's authority to remove this case to federal court under CAFA is not open to serious question. The wording of § 1453(b) (removal "by any defendant") differs significantly from that of § 1441(a) (removal "by the defendant or the defendants") and is more expansive by virtue of its inclusion of the word

"any." Because the wording of the two statutes differs significantly, a ruling in favor of third-party counterclaim defendants under § 1453(b) but against them under § 1441(a) would be fully consistent with "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Perhaps most importantly, upholding removal jurisdiction under § 1453(b) will prevent plaintiffs' attorneys from engaging in the very sorts of gamesmanship that Congress sought to prevent when it adopted CAFA. Congress adopted CAFA in part to "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S.Rep. No. 109-14 (2005) at 10. Filing class actions as counterclaims rather than as original complaints is a well-acknowledged strategy to defeat removal under CAFA. A decision that prevents use of such strategies furthers congressional purpose and is fully consistent with the text of CAFA.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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